

**THE ELLIOT LAKE
COMMISSION OF INQUIRY**

The Honourable Paul R. Bélanger,
Commissioner



**LA COMMISSION
D'ENQUÊTE ELLIOT LAKE**

L'honorable Paul R. Bélanger,
Commissaire

Ruling on Standing and Funding

The Inquiry Process

I have been appointed by Order in Council 1097/2012 to conduct an inquiry to:

- a. Inquire into and report on events surrounding the collapse of the Algo Centre Mall in Elliot Lake, Ontario, the deaths of Lucie Aylwin and Doloris Perizzolo and the injuries to other individuals in attendance at the mall and the emergency management and response by responsible bodies and individuals subsequent to the collapse;
- b. Review relevant legislation, regulations and bylaws and relevant policies, processes and procedures of provincial and municipal governments and other parties with respect to the structural integrity and safety of the Algo Centre Mall in Elliot Lake, Ontario;
- c. Review relevant legislation, regulations and bylaws and relevant policies, processes and procedures of provincial and municipal governments and other parties with respect to the emergency management and response to the collapse of the Algo Centre Mall Elliot Lake, Ontario.

The Commission has published its draft *Rules of Procedure* on its website at www.elliottlakeinquiry.ca. Section 28 of those *Rules* states that I anticipate conducting the hearings in two parts: one dealing with events prior to the collapse of the Algo Centre Mall in Elliot Lake on June 23, 2012, and the other dealing with events on and after that date. Section 4 of the Order in Council further states:

- 4. Where the Commissioner considers it essential and at his discretion, he may engage in any activity appropriate to fulfilling his duties, including:

[...]

- b. Conducting inter-jurisdictional research to identify practices and successes in other jurisdictions that are relevant to the Ontario experience;

At a later time, the Commission will, in consultation with parties granted standing, determine the best way to identify practices and successes in other jurisdictions that are relevant to the Ontario experience.

Public hearings will be held at the White Mountain Academy of the Arts in Elliot Lake, when witnesses will give evidence on oath or affirmation and will be examined and cross-examined by

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Commission Counsel and counsel for parties granted standing. Parties with standing will make closing submissions when the witnesses have all been heard. I will later announce the commencement date of those hearings.

Parties granted standing by this order may make submissions relating to the *Rules of Procedure* as presently promulgated and, if appropriate, those *Rules* may be changed or amended to reflect those submissions. Any such submissions should be provided to the Commission within 30 days of this Ruling.

Standing and Funding

Pursuant to its mandate, on September 26, 2012 the Commission published *Rules of Standing and Funding*¹ and invited those interested in seeking standing and funding to apply in writing by October 17, 2012. In September 2012, the Inquiry also issued a Call for Applications for Standing and Funding in several major and legal newspapers.

Section 15 of the *Public Inquiries Act, 2009* provides:

PARTICIPATION AT A PUBLIC INQUIRY

Determination of participation

15. (1) Subject to the order establishing the commission, a commission shall determine,

- (a) whether a person can participate in the public inquiry;
- (b) the manner and scope of the participation of different participants or different classes of participants;
- (c) the rights and responsibilities, if any, of different participants or different classes of participants; and
- (d) any limits or conditions on the participation of different participants or different classes of participants.

Considerations

(2) Before making a decision under subsection (1), the commission shall consider,

- (a) whether a person has a substantial and direct interest in the subject matter of the public inquiry;
- (b) whether a person is likely to be notified of a possible finding of misconduct under section 17;

¹ On the same day, the Commission issued *Revised Rules of Standing and Funding*.

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(c) whether a person's participation would further the conduct of the public inquiry; and

(d) whether a person's participation would contribute to the openness and fairness of the public inquiry.

Representation

(3) A person who is permitted to participate in a public inquiry,

(a) may participate on their own behalf;

(b) may be represented by a lawyer; or

(c) may, with the leave of the commission, be represented by an agent.

Section 11 of the *Revised Rules of Standing and Funding* provides that standing will be granted at the discretion of the Commissioner, in accordance with Section 15 of the *Act* above, the Commission's Terms of Reference as outlined in the Order in Council and the desirability of a fair and expeditious proceeding.

As per Rule 16 of the *Revised Rules of Standing and Funding*, participants in the Inquiry with standing may have:

1. Access to documents collected by the Commission subject to the *Rules of Procedure*;
2. Advance notice of documents which are proposed to be introduced into evidence;
3. Advance provision of statements of anticipated evidence;
4. A seat at counsel table;
5. The opportunity to suggest witnesses to be called by Commission Counsel, failing which an opportunity to apply to me to lead the evidence of a particular witness;
6. The opportunity to suggest witnesses to be called by Commission Counsel, and if those witnesses are not called, the opportunity to apply to me to lead the evidence of a particular witness;
7. The opportunity to make closing submissions; and
8. The opportunity to apply for funding pursuant to the *Revised Rules on Standing and Funding*.

To avoid repetition and unnecessary delay, as discussed below, I have urged certain applicants to be grouped together, where the applicants have similar interests or perspectives, and where there is no apparent conflict of interest. I have grouped applicants together where I am satisfied that the relevant interest or perspective will be fully and fairly represented by a single grant of standing to the parties as a group.

Commission Counsel will assist me throughout the Inquiry. They do not represent any particular interest or point of view. Their role is not adversarial or partisan. Their principal responsibility is

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to ensure that all matters bearing upon the public interest are brought to my attention. They will have full standing throughout.

On the issue of funding, I note that I do not have the power to order funding to applicants. The Order in Council provides that I may make recommendations to the Attorney General regarding funding to participants where in my view the participants would not otherwise be able to participate in the Inquiry without such funding. Any funding provided will have to be in accordance with applicable Management Board of Cabinet Directives and Guidelines ("*Guidelines for Reimbursement of Legal Fees and Disbursements*"). They may be found on our website.

In addition, Rule 23 of the *Revised Rules of Standing and Funding* provides that the Commissioner will also consider, among other things, the following factors in making his funding recommendations:

- a. the nature of the applicant's interest and/or proposed involvement in the Inquiry;
- b. whether the applicant has an established record of concerns for and a demonstrated commitment to the interest it seeks to represent;
- c. whether the applicant has special experience or expertise with respect to the Commission's mandate; and
- d. whether the applicant has attempted to form a group with others of similar interests.

On October 15, 2012, I also issued Procedural Order No. 1 in which I drew the attention of the persons applying for funding to Rule 21 of the *Revised Rules of Standing and Funding*, and more specifically Rule 21(c), which describes the evidence that must be filed in support of such a request. Individuals or organizations who had already filed their Motion for Funding were advised that they may choose to file further material by October 17, 2012.

Applications for Standing and Funding

Eighteen groups or individuals sought standing and/or funding by the deadline. The Commission set Friday October 26, 2012 at the Hampton Inn Hotel in Elliot Lake as the date for hearing motions for standing and funding. However, a number of persons and organizations/associations

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were advised beforehand that they did not need to attend that hearing.² I heard submissions from six applicants.

The chart at Appendix "A" identifies the applicants, their counsel, the part of the hearings for which they desire standing and/or funding and the nature of funding they are seeking.

Decisions on Standing and Funding

1) Standing

With the factors set out above in mind, I now turn to the eighteen requests for standing that the Commission has received. The full list of persons granted standing can be found at Appendix "B" to this ruling.

Réjean Aylwin, Rachelle Aylwin, Stéphane Aylwin, Teresa Perizzolo and Cindy Lee Allan

These Applicants are the families of the two Elliot Lake residents who died in the Mall collapse, Lucie Aylwin and Doloris Perizzolo. Réjean and Rachelle Aylwin are the father and mother of Lucie Aylwin and Stéphane is her brother. Teresa Perizzolo and Cindy Lee Allan are the daughters of Doloris Perizzolo.

Clearly, as the families of the victims of this tragedy, they have a direct and substantial interest in the work of this Inquiry. **Full standing is granted.**

Eastwood Mall Inc., Robert Nazarian and Levon Nazarian

Eastwood Mall Inc. owned the Algo Centre Mall from 2005 to the present date, including on the date of the collapse. The Notice of Application and accompanying submissions assert that Robert Nazarian is a director, President, owner and operator of Eastwood Mall Inc.; Levon Nazarian, his son, worked for Eastwood Mall Inc. as an independent contractor and administrator; and Levon Nazarian oversaw the administration of Eastwood Mall Inc.'s business transactions, including assisting with the leases and retaining contractors and engineers.

This corporation and these individuals are directly connected to the ownership and management of the Mall at the time of the collapse. They are the object of a number of investigations. They submit that they anticipate receiving notices pursuant to Section 17 of the *Public Inquiries Act*,

² See Procedural Order No. 2 issued October 19, 2012. Following the issuance of this Order, Non-Profit Retirement Residences of Elliot Lake and 1425164 Ontario Ltd. withdrew their request for funding and were therefore advised that their presence was not required. Further, Stuart Brindley advised the Commission that he was unable to attend and was therefore relying on his written submissions.

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2009. They clearly have a significant, substantial and direct interest. They have requested standing in relation to **Part 1** of the Inquiry and standing is **granted** as requested.

Non-Profit Retirement Residences of Elliot Lake Inc. and NorDev 1425164 Ontario Ltd.

Non-Profit Retirement Residences of Elliot Lake Inc. was the sole shareholder of 1309900 Ontario Ltd, later amalgamated into 1425164 Ontario Ltd., which owned the Algo Centre Mall from 1999 to 2005.

As a previous owner of the Mall, this entity has a substantial and direct interest in the subject matter of the Inquiry and its participation would further the conduct of the Inquiry. Standing in relation to **Part 1** of the Inquiry is **granted**.

Robert Wood and Greg Saunders

Messrs. Wood and Saunders were employed by and shareholders of the engineering firm M.R. Wright and Associates that conducted inspections for, and reported to, the owners of the Algo Centre Mall prior to the collapse. M.R. Wright and Associates is a defendant in individual and class action lawsuits. They have requested standing in relation to **Part 1** of the Inquiry. Since they may have conflicting or opposing positions to advance at the Inquiry, individual standing is **granted** to each of them as requested.

Martinette Venter, Shoppers Drug Mart Associate #667

As the owner and operator of the lottery ticket kiosk whose employee, Lucie Aylwin, was killed by the collapse, this Applicant has a substantial and direct interest in the subject matter of the Inquiry and her participation would further the conduct of the Inquiry. Standing in relation to **Part 1** of the Inquiry is **granted**.

Government of Ontario

The Government, particularly the Ministry of Community Safety and Correctional Services, the Ministry of Labour and the Ontario Provincial Police, has a clear and important interest in the issues raised by the Order in Council and meets the criteria for full standing. **Full standing** in all aspects of the work of the Commission is **granted**.

The Corporation of the City of Elliot Lake

The City of Elliot Lake has a clear and important interest in the issues raised by the Order in Council and meets the criteria for full standing. **Full standing** in all aspects of the work of the Commission is **granted**.

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Elliot Lake Mall Action Committee ("ELMAC")

The Elliot Lake Mall Action Committee is a community group that represents a large number of owners/operators, employers and employees of stores and businesses in the Algo Centre Mall as well as persons injured by the collapse. It is seeking full standing.

Prior to the October 26, 2012 hearing, I requested that ELMAC, Peter Unfried and the Seniors' Action Group of Elliot Lake ("SAGE") discuss the possibility of being grouped together under one grant of standing. On October 26, 2012, ELMAC advised that Mr. Unfried had agreed to be represented by ELMAC. ELMAC advised that it was still in discussion with SAGE about possible cooperation and joint representation. I provided ELMAC until noon on November 2, 2012 to advise me of the outcome of these discussions with SAGE. On November 2, 2012, I was advised by ELMAC that while SAGE continued to seek full standing, it had come to an agreement with counsel for ELMAC to be represented by ELMAC's counsel group.

Being the only broad-based community group seeking standing before this Commission, it is evident that ELMAC has a clear and important interest in the issues raised by the Order in Council. It meets the criteria for **full standing**, which is **granted**. I address below the request for standing of SAGE.

Association of Professional Engineers of Ontario ("PEO")

The PEO is the licensing and regulatory body for professional engineering in the Province of Ontario. It has launched two investigations related to the collapse of the Algo Centre Mall. The PEO has issued guidelines in connection with the practice of professional engineering, including guidelines relating to professional engineers providing services in construction and building. The PEO clearly has an important interest and expertise in the issues raised by the Order in Council and is **granted standing** in relation to **Part 1** as requested in its notice of motion.

Ontario Association of Fire Chiefs

This association represents the chief fire officers of the 462 municipal fire departments in Ontario, which employ 30,526 firefighters, career, part-time and volunteer. The Association's mission is leading innovation and excellence in public and life safety. This Association's expertise will clearly be of value to the Inquiry in relation to emergency management and response. Standing in relation to **Part 2** of the Inquiry is **granted**.

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Ontario Building Officials Association (“OBOA”)

The OBOA, which has approximately 2,000 active members, is a self-governing, not-for-profit corporation which supports Ontario building officials by delivering training and certification. Since 1974, it has been selected annually by the Ontario government to deliver training courses related to the *Ontario Building Code* and is permitted by statute to grant the designation of Certified Building Code Official to those who have satisfied its established qualifications. It also publishes quarterly the *Journal*, its professional magazine for its members. OBOA clearly has an important interest and expertise in the issues raised by the Order in Council and is **granted standing** in relation to **Part 1** as requested in its notice of motion.

Elliot Lake Professional Fire Fighters Association, IAFF Local 1351, Toronto Professional Fire Fighters Association, IAFF Local 3888, Ontario Professional Fire Fighters Association (OPFFA) and the International Association of Fire Fighters (IAFF)

The Elliot Lake firefighters initially responded to the collapse of the Algo Centre Mall and members of the Toronto local responded as members of the Heavy Urban Search and Rescue (“HUSAR”) team. The OPFFA and the IAFF are the provincial and international associations to which the Elliot Lake and Toronto locals are affiliated.

The members of these associations, conveniently grouped together, have a substantial and direct interest in the subject matter of the Inquiry and their participation would further the conduct of the Inquiry. They will, together as one group, be **granted standing** in relation to **Part 2** of the Inquiry.

Ontario Society of Professional Engineers (the “Society”)

The Society is a not-for-profit corporation concerned with promoting the professional and economic interests of professional engineers in Ontario. It has approximately 6,000 members who are professional engineers and another 3,000 members who are in other engineering categories. The Society was created in 2000 to separate the regulatory (PEO) and non-regulatory affairs of the engineering profession in Ontario. The Society clearly has an important interest and expertise in the issues raised by the Order in Council and is **granted standing** in relation to **Part 1**.

Stuart J. Brindley

Mr. Brindley is the founder and president of S.J. Brindley Consulting Inc., a consulting company specializing in emergency management, with experience across North America addressing issues related to critical infrastructure protection. He is a registered Professional Engineer with more than 29 years in the electricity sector and has led the development of the electricity sector’s critical infrastructure protection program across North America.

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Mr. Brindley was unable to attend the hearing and advised the Commission that he relied on his written submissions. However, he is not an area resident, was not a witness to any of the events in question and has no financial or proprietary interest that relates to the subject matter of the Inquiry. I find that he does not meet the criteria contained in Section 11 of the *Revised Rules on Standing and Funding* and standing is consequently **not granted**. Commission Counsel, however, may wish to contact him to determine if he can provide any informal assistance to their work.

Peter D. Unfried

Mr. Unfried was the owner of Thomsen's The Jewellery Doctor, which was located in the Mall. At the hearing on October 26, 2012, Mr. Unfried withdrew his motion and agreed that his interests were similar to those of ELMAC and could be advanced by that organization. There is therefore no longer any motion for standing before me by Mr. Unfried.

Victim Services of Algoma

Victim Services of Algoma is a volunteer-based not-for-profit Transfer Agency which responds to calls for local police services and emergency services to assist victims of crime and tragic circumstances. It is funded by the Ministry of Attorney General through the Victims Justice Fund.

At the hearing, Commission Counsel gave assurances to Victim Services of Algoma that the interests of the organization would be addressed by the Commission at the hearings. The organization was advised that the Executive Director (and other members of the organization if requested) would be interviewed at length by Commission Counsel and that she would be called as a witness. The organization appeared fully satisfied by those assurances. Standing is **not granted** to this Applicant.

Seniors' Action Group of Elliot Lake ("SAGE")

This is a recently-formed organization whose mission is to "defend, advance and communicate" the common interests of its members who are seniors and retirees of Elliot Lake. Its members attend Council and committee meetings and host a Web site. It produces reports and correspondence to both its members and citizens at large, as well as politicians and government officials at all levels.

I was advised on November 2, 2012 that, while SAGE continued to seek full standing, it had come to an agreement with counsel for ELMAC to be represented by ELMAC's counsel group. Consequently, given that SAGE's interests can and will be represented by ELMAC, standing is

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granted on the condition that SAGE be represented by the same counsel as ELMAC. Should a conflict arise between SAGE and ELMAC, SAGE will be free to make a new application for standing.

2) Funding

The following are my recommendations on funding, which are also summarized at Appendix "C".

Elliot Lake Mall Action Committee ("ELMAC")

This community group represents a large number of individuals who have been financially impacted (or in some cases devastated) by the collapse of the Mall. Many have lost their businesses or employment. In support of its request for funding, ELMAC has filed the Affidavit of Jean Pomerleau, one of the three members of its steering committee, in which he describes the financial means of the group.

The ELMAC's submissions in support of its request for funding can be summarized as follows:

1. ELMAC is a volunteer not-for-profit association and does not have financial resources to participate in the Inquiry;
2. ELMAC has no assets or source of revenue and does not charge a fee to its members to join; and
3. ELMAC's membership is largely composed of retired individuals on a fixed income, business owners who have seen their occupation and sole means of income destroyed in the Mall's collapse and former Mall workers who lost their employment and who may face an uncertain financial future.

As previously noted, ELMAC has agreed to represent the interests of SAGE and Peter D. Unfried. I am satisfied that without funding, they could not properly participate in the work of this Inquiry. I recommend to the Attorney General that funding for one senior and one junior counsel be provided in accordance with the *Guidelines for Reimbursement of Legal Fees and Disbursements*, on the understanding that the senior counsel position will alternate between Messrs. R. Douglas Elliot, Jeff Broadbent and Roland Aubé.

Greg Saunders

As part of his Application, Mr. Saunders sought funding. However, on November 6, 2012, counsel for Mr. Saunders advised the Commission that funding would be provided to Mr. Saunders by his insurer and he therefore withdrew his request for funding.

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The Corporation of the City of Elliot Lake

The application filed by the Corporation of the City of Elliot Lake ("City of Elliot Lake" or "City") included a request for standing but no request for funding. Commission Counsel was advised by Counsel for the City, John Walker, that the City's insurance company would be funding the City's appearance before the Commission.

However, on October 23, 2012, Commission Counsel was advised by the City's counsel that the insurer had decided not to fund his expenses to appear before the Commission and that the Application for Standing would now be handled by Wishart Law Firm LLP. On October 24, 2012, Paul Cassan of Wishart Law Firm LLP confirmed that he was acting on behalf of the City and that on October 26, 2012 he would be seeking from the Commission an extension of time to file a request for funding.

At the hearing on October 26, 2012, I granted the City of Elliot Lake one further week, until noon on November 2, 2012, to provide material in support of an application for funding, in view of the change in counsel and the issue relating to the municipality's insurance coverage.

On November 2, 2012, the City of Elliot Lake filed a Motion Record comprised of a Notice of Motion for an order recommending funding as well as two affidavits. The first affidavit was sworn by Robert deBortoli, Chief Administrative Officer for the City ("deBortoli Affidavit") and the second affidavit was sworn by Linda Hurdle, Assistant to Mr. Cassan ("Hurdle Affidavit"). In his Affidavit, Mr. deBortoli outlines the history of the City of Elliot Lake as well as its current financial situation. He also includes as exhibits, among other things, the following supporting documents:

1. The City's 2011 audited financial statements;
2. Assessment documentation and tax bills for the Algo Centre Mall;
3. The City's 2012 Budget Summary;
4. The City's Emergency Response Costs following the Algo Mall collapse;
5. The City's 2013 Budget;
6. The City's Consolidated Statement of Accumulated Surplus for the year 2011; and
7. Documentation relating to the City's liability coverage.

The Hurdle Affidavit provides a copy of the KPMG study the City undertook to find out whether there were any further expenses it could cut to mitigate its financial position. Ms. Hurdle also advised being informed by Mr. deBortoli that all identifiable cost cutting measures available to the City have been completed.

The City's submissions in support of its request for funding can be summarized as follows:

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1. In 2010, the City cut the municipal tax rate from 2.99% to 2.00% which resulted in the diminution of the City reserves; the City no longer has a Working Capital Reserve fund or a Tax Rate Stabilization Fund;
2. The loss of the Mall has resulted in 200 lost jobs City-wide;
3. The loss of the Mall represents a loss of over \$180,000 in tax revenue for the City, which represents two percent of the municipal tax base;
4. As a result of the collapse, the City has incurred expenses for the emergency response of over \$130,000;
5. As a result of the loss of facilities, the City has been required to fund part of the renovation of the White Mountain Academy at a cost of \$240,772;
6. The City is involved in the acquisition and site preparation for the "Pearson Plaza" which will replace the Algo Centre Mall; the cost of this site preparation is \$3.5 million, of which the City expects to fund at least \$700,000;
7. The City has exceeded its budget for legal fees for 2012;
8. A tax increase of 5.1% is projected for the 2013 budget. An additional 3.91% tax increase would be required to cover the legal fees for the preparation and attendance at the Inquiry; and
9. The City does not have any insurance coverage for the legal representation before the Inquiry.

The City of Elliot Lake has evidently been directly impacted fiscally by the collapse of the Algo Centre Mall. The Municipality is a relatively small one and does not have sufficient reserves to fund legal representation, particularly for the entire term of the Commission hearings. There are no insurance proceeds to cover this representation. I recommend to the Attorney General that funding for one senior counsel and one junior counsel be provided in accordance with the *Guidelines for Reimbursement of Legal Fees and Disbursements*. Counsel for the City has advised that different lawyers from Wishart Law Firm LLP will replace counsel on occasion and that the City is not seeking funding for more than one senior counsel to be present at the Inquiry at any one point.

Ontario Building Officials Association ("OBOA")

On October 11, 2012, along with its Motion for Standing, the Commission received a Motion for Funding from the OBOA. The Motion Record consisted of a Notice of Motion along with an Affidavit from Ronald M. Kolbe, Chief Administrative Officer of the OBOA. In his Affidavit, Mr. Kolbe advises that the OBOA's revenue sources are sufficient to allow it to efficiently undertake its day-to-day operations and fulfill its corporate objects, train and educate its members and provide services to its membership. He further advises that the OBOA does not have adequate financial resources to cover the costs to retain legal counsel to allow it to participate at the Inquiry. He states that to fund the OBOA's participation at the Inquiry

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constitutes an extraordinary and unforeseen expense beyond the Association's financial resources.

On October 15, 2012, Commission Counsel wrote to Counsel for the OBOA advising that it would be of assistance if he could provide further evidence to establish that, if funding is not provided, the OBOA would not be able to participate in the Inquiry. Commission Counsel further advised:

We are particularly interested in the financial statements of your client for this fiscal year and the preceding year, setting out its assets and liabilities, and revenue and expenses, both anticipated and actual year to date, together with the amount and purpose of any reserves. If you wish to apply for an order of confidentiality in respect of this information, the procedure is set out in the Commission's Rules of Procedure.

On October 17, 2012, the OBOA filed a Supplemental Motion Record including a Supplemental Affidavit of Ronald M. Kolbe. In this Supplemental Affidavit, Mr. Kolbe provided copies of the 2011, 2010 and 2009 audited OBOA annual financial statements disclosing the financial standing of the Association. He further explained that the use of OBOA's reserve funds were restricted to the purposes for which they were established with a clear corporate objective.

In considering the OBOA's request for funding, I have considered the decision on Standing and Funding rendered by Commissioner O'Connor in the Walkerton Inquiry. Commissioner O'Connor stated that the expression "the party would not otherwise be able to participate in the Inquiry without such funding" does not require a demonstration of impecuniosity before funding could or should be recommended. In particular, in relation to organizations, Commissioner O'Connor was satisfied that where financial reserves for such organizations were dedicated to financing their core objects, purposes or activities it was appropriate to conclude that, without funding, such organizations would not otherwise be able to participate in the Inquiry. Among others, in the Walkerton Inquiry, Commissioner O'Connor recommended funding to the Association of Municipalities of Ontario and the Professional Engineers and Architects of the Ontario Public Service. The same principle was adopted by Commissioner Glaude in the Cornwall Inquiry where he recommended funding to the Diocese of Alexandria-Cornwall. In my view, the same principles apply in the case of the OBOA.

I therefore recommend to the Attorney General that funding for one senior counsel be provided in accordance with the *Guidelines for Reimbursement of Legal Fees and Disbursements*.

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Eastwood Mall Inc., Robert Nazarian and Levon Nazarian

Eastwood Mall Inc. and Robert Nazarian first applied for standing and funding on or about October 5, 2012 when they were represented by Antoine-René Fabris. The application consisted of three and a half pages comprising a Notice of Application, but no affidavit or evidence.

On October 15, 2012, following the issuance of Procedural Order No. 1, Commission Counsel wrote to Mr. Fabris advising him that it would be of assistance to the Commission if he could provide evidence to establish that, if funding is not provided, Robert Nazarian and Eastwood Mall Inc. would not be able to participate in the Inquiry. Commission Counsel further advised:

The following questions address particular issues in which the Commission is interested, but are not intended to limit your client's obligation to provide evidence on this issue.

We are particularly interested in financial statements from each of your clients, showing their assets and liabilities and, for Eastwood Mall Inc., projected (and actual year to date) revenue and expenses for this fiscal year and the prior fiscal year. We would expect that these financial statements would provide sufficient detail to allow the Commissioner to determine the issue he is required to determine, and would include any notes to financial statements prepared by the accounting firm responsible for their preparation. For Mr. Nazarian, we would appreciate, in addition to the financial statement showing his assets and liabilities, evidence to show his income, actual and expected, for 2011 and 2012, and a copy of his income tax return for 2011.

We would also be interested in details of the insurance available to either of your clients with respect to the events of June 23, 2012, and particulars and supporting documentation with respect to the last sentence of paragraph 6 of your application.

At paragraph 6 of their application, Eastwood Mall Inc. and Robert Nazarian stated that insurance proceeds were being held in trust pending the result of any liability claims. No additional evidence was received from Mr. Fabris on behalf of his client.

On October 17, 2012, the Commission received a new application for standing and funding from Eastwood Mall Inc., Robert Nazarian and Levon Nazarian through their counsel Pradeep Chand and Peter Thorning (Brauti Thorning Zibarras). The new application was submitted in addition to, and jointly with, the application brought by Mr. Fabris. The application consisted of a notice of application and submissions on standing and funding, but was not supplemented by affidavits or evidentiary material of any sort. Subsequently, on the same day, Commission Counsel wrote to Messrs. Fabris and Chand acknowledging receipt of the application, to be considered jointly

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with Mr. Fabris' application. Commission Counsel noted that the Commission had not yet received any additional evidence requested in the letter to Mr. Fabris of October 15, 2012.

Later on October 17, 2012, the Commission received an affidavit from Oliver Fonseca, law clerk at Brauti Thorning Zibarras in support of the application ("Fonseca Affidavit"). The Fonseca Affidavit contained bare and unsupported claims consisting entirely of hearsay statements.

On October 22, 2012, Commission Counsel wrote to Messrs. Fabris and Chand asking whether their clients had approached their insurance company to find out whether it would cover their legal representation before the Commission. On the same day, Commission Counsel spoke with Mr. Chand who advised that he was putting together an affidavit with more financial information, which he would be submitting together with an application that the financial information be the subject of a confidentiality order. No material was received by the Commission on October 22, 2012.

On October 24, 2012, Mr. Chand advised that he expected to deliver his materials shortly. On the same day, Commission Counsel advised Mr. Chand that the Commissioner expected him to attend on October 26, 2012 if his clients intended on proceeding with their request for funding. Commission Counsel further advised that if Mr. Chand filed an application for a confidentiality order, he should expect to be asked by the Commission to address, in the public session, whether the persons granted standing as participants and the media ought to be given notice and an opportunity to be heard on the question of whether the confidentiality order ought to be issued. Commission Counsel referred Mr. Chand to *Dagenais v. Canadian Broadcasting Corp.*³, *Episcopal Corporation of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry*.⁴, *Vancouver Sun (Re)*⁵, *Toronto Star Newspapers Ltd. v. Ontario*⁶ and *Named Person v. Vancouver Sun*⁷.

On October 24, 2012, at 5:39 p.m., the Commission received a Book of Documents containing the following financial records related to Robert Nazarian, Levon Nazarian and Eastwood Mall Inc., along with submissions in support of a confidentiality order:

1. CRA Notice of Assessment for Tax Years 2007, 2008 and 2011 for Robert Nazarian;
2. CRA Income Tax and Benefit Return for Tax Year 2011 for Robert Nazarian;
3. Bank account statements for Robert Nazarian for various periods between July 1 and October 18, 2012;

³ [1994] 3 S.C.R. 835.

⁴ 2007 ONCA 20.

⁵ 2004 SCC 43, [2004] 2 S.C.R. 332.

⁶ 2005 SCC 41, [2005] 2 S.C.R. 188.

⁷ 2007 SCC 43, [2007] 3 S.C.R. 253.

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4. Profit and Loss/Balance Sheets for Eastwood Mall Inc. for January 1 to June 23, 2012;
5. Financial records and correspondence from Eastwood Mall Inc.'s accountants for the periods January 1, 2010 to December 31, 2010 and January 1, 2011 to December 31, 2011;
6. CRA Income Tax Return for Eastwood Mall Inc. for Tax Year 2011; and
7. CRA Income Tax and Benefit Return for Tax Year 2011 for Levon Nazarian.

At the hearing on October 26, 2012, I was informed that Antoine-René Fabris no longer represented these Applicants. I was also advised by Mr. Chand that paragraph 40 of the Applicants' Application on Funding, which stated that "Insurance proceeds are being held in trust pending the result of any liability claims" was submitted in error. Mr. Chand submitted that the Applicants had not received any insurance proceeds and that there are no monies held in trust in any lawyer's account. Mr. Chand further confirmed that the Applicants' insurance policy does not cover legal representation at the Inquiry and that the insurance company would not provide any *ex gratia* payments for legal representation and/or attendance at the Inquiry. I specifically advised Mr. Chand that this is the kind of information I would like to get proof about and that I wished to receive this information as part of his new material.

At the hearing, I informed counsel that in my opinion the material provided in support of their application was deficient, in that it did not constitute "evidence" as required by Section 21(c) of the *Rules on Standing and Funding*. None of the material provided was in original form. None of the documents formed part of sworn affidavits attesting to the accuracy of their content. No original certification was attached to any of the documents. In addition, their application was submitted only on October 24, well beyond the October 17 deadline specified by the *Rules*.

I nevertheless granted the Applicants a further week to submit new material, until noon on November 2, 2012. At the request of counsel, I also agreed to impose a temporary sealing order on the material already submitted until counsel have been given the opportunity to request and justify a confidentiality order. Counsel were further advised to be prepared to discuss the need to notify the media and other parties of any confidentiality request as well as to provide the media and other parties with an opportunity to make submissions on any such request. I will shortly be issuing a procedural order outlining the procedure to be followed with respect to the confidentiality order request.

On November 2, 2012, the three Applicants filed an Application Record, containing all materials originally submitted to the Commission plus the following additional documents:

1. Supplementary Submissions on Funding;
2. Affidavit of Fabio Brussolo ("Brussolo Affidavit");
3. Affidavit of Sam Hurmizi ("Hurmizi Affidavit");

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4. Affidavit of Robert Nazarian ("Nazarian Affidavit");
5. Letters from Michael Title, dated October 26, 2012;
6. Order to Prohibit Use and Occupancy, dated October 24, 2011;
7. Contract for the Demolition of the Algo Centre Mall;
8. Supplementary Submissions on behalf of the Diocese of Alexandria-Cornwall at the Cornwall Inquiry;
9. CRA Income Tax and Benefit Return for Tax Years 2008, 2009 and 2010 for Robert Nazarian;
10. Profit and Loss/Balance Sheets for Yorkdale Group Inc. as of 30 September 2012; and
11. Profit and Loss/Balance Sheets for Yorkdale Centres Inc. as of 30 September 2012.

I wish to address first the legal issue raised by the Applicants in their supplementary submissions. The Applicants urge me to recognize that the expression in the Order in Council "the party would not otherwise be able to participate in the Inquiry without such funding" does not require a demonstration of impecuniosity before funding is recommended. As I have explained in my ruling on funding for the OBOA, I agree that proof of impecuniosity is not a requirement. Indeed, financial reserves are not an impediment to a recommendation of funding. However, applicants seeking funding must be forthright and provide the Commission with a clear picture of their net worth, including their revenues, expenses, assets and liabilities.

A careful review of the documents provided by Eastwood Mall Inc., Robert Nazarian and Levon Nazarian leads me to conclude that they have not provided sufficient evidence to justify why they would not otherwise be able to participate in the Inquiry without such funding. In my view, their evidence is wholly deficient. In light of the temporary sealing order I granted on October 26, 2012, I will refrain from referring in this ruling to specific information contained in the documents provided.

The Applicants' submissions in support of their request for funding can be summarized as follows:

1. Eastwood Mall Inc.'s sole source of income ceased on the date of the collapse of the Algo Centre Mall;
2. Eastwood Mall Inc. was a significant source of both Robert and Levon Nazarian's income;
3. The Applicants have no sufficient source of income to support the funding for the Inquiry;
4. Eastwood Mall Inc. and Robert Nazarian are the subject of civil lawsuits; and
5. Robert Nazarian is the president and director of two other corporations, Yorkdale Group Inc. and Yorkdale Centre Inc.

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The two individual Applicants claim that it is “very clear that they do not have sufficient finances to fund this Inquiry.” I cannot agree.

The three additional affidavits filed unfortunately do not shed much light on the financial situation of the Applicants. The Brussofo Affidavit confirms that certain documents are genuine copies of what was filed by the Applicants and attests that the three Applicants have lost their most significant source of income. The Hurmizi Affidavit simply confirms that certain documents are genuine copies of what was filed by the Applicants. In his affidavit, Robert Nazarian attests that his *primary* source of income was Eastwood Mall Inc. This implies other sources, but they are not described. A statement to the same effect is made on behalf of Levon Nazarian in the application. It is doubly deficient, in that it is not a sworn statement and is similarly silent about other sources. 2011 tax returns by both individuals may be some evidence of income in that year but say nothing about their current income. More importantly (apart from ownership of Eastwood Mall Inc.), neither Nazarian gives the Commission any information about their personal assets and liabilities, their net worth, their global holdings or property interests. Without that information, it is impossible to arrive at the most rudimentary estimate of their current financial situation.

A further illustration of the incomplete nature of the materials provided is the fact that several entries record the transfer of various large sums into Robert Nazarian’s bank account without any explanation about their source.

With regard to Eastwood Mall Inc., the averments contained in the Applicants’ submissions and the material provided point to an important interrelationship between Eastwood Mall Inc., Yorkdale Group Inc., Yorkdale Centre Inc. and Robert Nazarian. That relationship, however, is entirely unexplained, beyond statements about Robert Nazarian’s position as president and director of the corporate entities (and owner and operator in Eastwood Mall Inc.’s case). The documents provided are completely silent about their corporate structure and share ownership. For example, it is unclear what kind of services or product is provided by Yorkdale Group Inc. and Yorkdale Centre Inc. and who their shareholders are. And yet, the financial statements of Yorkdale Group Inc., Yorkdale Centre Inc. and Eastwood Mall Inc. seem to show large transfers of funds between them.

The unaudited⁸ statements provided raise more questions than they answer.

Further, despite the specific request I made at the hearing regarding insurance coverage issues of the Algo Centre Mall, in particular the claim that the Applicants had received no insurance

⁸ The statements provided are at best the subject of a review engagement. In fact, it appears that for the 2010 statements of Eastwood Mall Inc., they are neither audited nor the subject of a review engagement.

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proceeds on account of the collapse, no evidence was provided by the Applicants relating to the nature and extent of coverage.

In view of the nebulous quality of the information provided to me, I am unable to make meaningful distinctions between Robert Nazarian and the corporate entities he is clearly connected to. There are tantalizing indications that these entities operate as a group under Mr. Nazarian's control, but I cannot come to that conclusion with any degree of confidence in view of the paucity of the materials provided.

Consequently, any absence of evidence relating to Robert Nazarian's wealth or net worth inevitably tends to percolate through to these companies and taints any attempt at a meaningful evaluation of the true financial position of any of the three Applicants.

In his affidavit, Robert Nazarian appears to be referring to the three Applicants requesting funding as a group, related to each other by common interest and joint enterprise.

Even if one of the three Applicants may appear to meet the test for funding, in light of the fact that the Applicants are applying as a group and are clearly financially related (along with Yorkdale Group Inc. and Yorkdale Centre Inc.), I cannot simply recommend funding to one of the Applicants while ignoring the deficiencies in evidence of the other two Applicants.

In conclusion, absent a transparent, full and complete explanation of the connections I have referred to above, and absent properly verified financial statements, I am not able at this time to recommend funding to the Applicants Eastwood Mall Inc., Robert Nazarian and Levon Nazarian.

Recommendation regarding Expenses for Counsel

It is essential that this Inquiry hold its hearings in Elliot Lake, where this tragic mall collapse took place. However, that will mean added expense, especially for counsel who must travel great distances to get to Elliot Lake. I therefore recommend that the Attorney General consider additional funding for accommodation and travel for counsel whose practice is not in Elliot Lake. Arrangements for rental housing as opposed to hotel accommodations may be more practical and economical in this respect.

3) Summary

I have granted standing to four participants for the full inquiry, eight participants for Part 1 and two participants for Part 2. The full list of persons granted standing can be found at Appendix "B" to this ruling. I have recommended funding for three participants. The list of persons for whom I have recommended funding can be found at Appendix "C".

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At all times, I expect parties with similar interests to cooperate with one another and with Commission Counsel to avoid repetition and delay. I will not hesitate to intervene to ensure these limits are respected and this Inquiry is conducted in a fair but expeditious manner.

I thank all of the individuals and groups who have taken the time to file applications and I look forward to working with all those granted standing in this important work.

ISSUED at Ottawa, Ontario, this 8th day of November, 2012.

A handwritten signature in black ink, appearing to read "P. Bélanger", written over a horizontal line.

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Appendix "A"

Summary of Applications for Standing and/or Funding

Applicant	Counsel	Part (1: Events prior to the collapse; 2: Events on or after 23 June 2012)	Request Standing?	Request Funding?	Nature of funding request
Elliot Lake Mall Action Committee ("ELMAC")	Douglas Elliot of Roy Elliot O'Connor LLP and Roland Aubé Jeff Broadbent of Feifel Broadbent Gualazzi LLP	1 & 2	Yes	Yes	one senior counsel, one junior counsel from Roy Elliot O'Connor LLP with periodic assistance from Jeff Broadbent or Roland Aubé as Senior Counsel substituting for Elliot
Réjan Aylwin, Rachelle Aylwin, Stéphane Aylwin, Teresa Perizzolo and Cindy Lee Allan	Roger Oatley and Shenthuran Subramaniam of Oatley, Vigmond LLP	1 & 2	Yes	No	
NorDev (1429164 Ontario Ltd.) and Non-Profit Retirement Residences	Douglas Kearns of Kearns Law Office	1	Yes	No	
Eastwood Mall Inc., Robert Nazarian and Levon Nazarian	Pradeep Chand and Peter Thorning of Brauti Thorning Zibarras LLP	1	Yes	Yes	three experienced counsel and one junior counsel; travel and accommodations while in Elliot

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Applicant	Counsel	Part (1: Events prior to the collapse; 2: Events on or after 23 June 2012)	Request Standing?	Request Funding?	Nature of funding request
					Lake; disbursements, such as photocopies, faxes, retaining experts etc.
Greg Saunders, P. Eng	Joseph A. Bisceglia of Bisceglia Dumanski Romano & Johnson LLP	1	Yes	No	
Ontario Building Officials Association ("OBOA")	Leo F. Longo of Aird & Berlis LLP	1	Yes	Yes	one counsel
Peter D. Unfried	n/a	2	Yes	Yes	one counsel
Robert Wood, B. Sc. Eng.	Michael S. O'Neill of O'Neill DeLorenzi Mendes	1	Yes	No	
Professional Engineers of Ontario	Leah Price	1	Yes	No	
The Corporation of the City of Elliot Lake	Paul Cassan of Wishart Law Firm LLP	1 & 2	Yes	Yes	one senior counsel, two junior counsel, one articling student, one law clerk (only one counsel at any one point), accommodation
Senior's Action Group	n/a	1 & 2	Yes	Yes	Costs to obtain documents through

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Applicant	Counsel	Part (1: Events prior to the collapse; 2: Events on or after 23 June 2012)	Request Standing?	Request Funding?	Nature of funding request
of Elliot Lake ("SAGE")					the Commission and costs for mailing or courier services.
Victim Services of Algoma	n/a	2	Yes	No	
Elliot Lake Professional Fire Fighters Association (IAFF Local 1351), Toronto Professional Fire Fighters Association (IAFF Local 3888), Ontario Professional Fire Fighters Association (OPFFA) and the International Association of Fire Fighters	Sean McManus of McManus & Hubler	2	Yes	No	
Province of Ontario	Kim Twohig, Darrell Kloeze, Norm Feaver, Heather Mackay and Kirstin Smith	1 & 2	Yes	No	
Shoppers Drug Mart Associate #667,	Joseph K. Morrison of Mathews, Dinsdale & Clark	1 & 2	Yes	No	

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Applicant	Counsel	Part (1: Events prior to the collapse; 2: Events on or after 23 June 2012)	Request Standing?	Request Funding?	Nature of funding request
Martinette Venter	LLP				
Stuart J. Brindley, P. Eng (S.J. Brindley Consulting Inc.)	n/a	2	Yes	Yes	Cost of travel and accommodation.
Ontario Society of Professional Engineers	Robert England of Miller Thomson LLP	1	Yes	No	
Ontario Association of Fire Chiefs	n/a	2	Yes	No	

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Appendix "B"

Parties with Standing

Parties - Full Standing

Rejean Aylwin, Rachelle Aylwin, Stéphane Aylwin, Teresa Perizzolo and Cindy Lee Allan

Government of Ontario

The Corporation of the City of Elliot Lake

Elliot Lake Mall Action Committee

Parties - Part I Standing

Eastwood Mall Inc., Robert Nazarian and Levon Nazarian

Non-Profit Retirement Residences of Elliot Lake Inc. and NorDev 1425164 Ontario Ltd.

Robert Wood

Greg Saunders

Shoppers Drug Mart Associate #667, Martinette Venter

Association of Professional Engineers of Ontario

Ontario Building Officials Association

Ontario Society of Professional Engineers

Parties - Part II Standing

Ontario Association of Fire Chiefs

Elliot Lake Professional Fire Fighters Association, IAFF Local 1351, Toronto Professional Fire Fighters Association, IAFF Local 3888, Ontario Professional Fire Fighters Association (OPFFA) and the International Association of Fire Fighters (IAFF)

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Appendix "C"

Recommendations on Funding

Applicant	Funding recommended	Funding not recommended	Nature of funding
Elliot Lake Mall Action Committee ("ELMAC")	√		one senior counsel, one junior counsel from Roy Elliot O'Connor LLP with periodic assistance from Jeff Broadbent or Roland Aubé as Senior Counsel substituting for R. Douglas Elliot
The Corporation of the City of Elliot Lake	√		one senior counsel, one junior counsel and no more than one senior counsel to be present at the Inquiry at any one point
Ontario Building Officials Association ("OBOA")	√		one senior counsel
Eastwood Mall Inc., Robert Nazarian and Levon Nazarian		√	